UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA)
)
vs.) **Case No. CR-00-S-422-S**
)
ERIC ROBERT RUDOLPH)

MEMORANDUM OPINION AND ORDER

This case is before the court on defendant's "Application for Review and Appeal of [the] Magistrate Judge's Order of September 14, 2004[,] Denying the Defendant's Motion for Discovery of Materials Related to the Scientific Testing of Atlanta Bombing Evidence" (doc. no. 331).

Defendant requested discovery relating to scientific testing of evidence connected to three investigations in the Northern District of Georgia, where he also is charged with federal offenses. The government objected, arguing that it does not intend to introduce evidence from the Atlanta bombings in either the guilt or penalty phases of trial in this District. The magistrate judge agreed with the government, finding that there will be nothing for defendant to refute if the government remains silent about the Atlanta evidence during the Birmingham trial.[1] The magistrate judge further concluded that evidence of scientific testing connected to the Atlanta

[1] *See* Magistrate Order at 6 (doc. no. 322).

bombings is not "material" to the preparation of the Birmingham defense.[2] Defendant appeals this ruling.

I.

Defendant initially argues that a lenient standard of "materiality" applies to pretrial disclosures under Federal Rule of Criminal Procedure 16(a)(1)(F);[3] and, in support of this argument, he relies upon the following statement from the Eleventh Circuit's opinion in *United States v. Jordan*, 316 F.3d 1215 (11th Cir.), *cert. denied*, ___ U.S. ___, 124 S. Ct. 133, 157 L. Ed. 2d 40 (2003): "the defendant must make a specific request for the item together with an explanation of how it will be 'helpful to the defense.'" *Id.* at 1250-51 (citations omitted).

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[2] *Id.*

[3] Federal Rule of Criminal Procedure 16(a) sets forth the pre-trial discovery obligations of the government. "The rule 'is intended to prescribe the minimum amount of discovery to which the parties are entitled,' and leaves intact a court's 'discretion' to grant or deny the 'broader' discovery requests of a criminal defendant." *United States v. Jordan*, 316 F.3d 1215, 1249 n.69 (11th Cir. 2003) (quoting Advisory Committee Notes to 1974 Amendments to Fed. R. Crim. P. 16). In relevant part, the Rule provides that,

> [u]pon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination *and of any scientific test or experiment if*:
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> **(i)** the item is within the government's possession, custody, or control;
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> **(ii)** the attorney for the government knows — or through due diligence could know — that the item exists; **and**
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> **(iii)** *the item is material to preparing the defense* or the government intends to use the item in its case-in-chief at trial.

Fed. R. Crim. P. 16(a)(1)(F) (emphasis supplied).

According to defendant, the magistrate judge erroneously applied the more stringent standard of materiality articulated in *United Sates v. Buckley*, 586 F.2d 498 (5th Cir. 1978), and *United States v. Ross*, 511 F.2d 757 (5th Cir. 1975): *i.e.*,

> [I]t is incumbent upon a defendant to make a *prima facie* showing of "materiality in order to obtain discovery:
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> > Materiality means more than that the evidence in question bears some abstract logical relationship to the issues in the case. . . . There must be some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.

Buckley, 596 F.2d at 506 (quoting *Ross*, 511 F.2d at 762-63).[4] According to defendant, this standard of materiality "is appropriate in a post-conviction context but not in a pretrial setting. . . . [T]here is a lowered standard . . . for the preliminary showing of materiality that must be met in a pre-trial application under *Brady* or pursuant to Rule 16."[5]

This court disagrees. The magistrate judge applied the correct standard. Admittedly, the Eleventh Circuit in *Jordan* addressed the standard of materiality required for a defendant to compel the government to disclose documents under the language of what now is designated Rule 16(a)(1)(E)[6] rather than, as here, Rule

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[4] *See also* Magistrate Order (doc. no. 322), at 2-3.

[5] Application for Review (doc. no. 331), at 3 (citations omitted).

[6] The *Jordan* opinion addressed the language of Rule 16(a)(1)(C) which, on the date of trial in 2000, read as follows:

16(a)(1)(F), but that is a distinction without a meaningful difference to the present analysis. Although defendant prefers to focus upon that portion of the *Jordan* opinion most favorable to his contention, it is a thread pulled from the fabric of discussion. When the quoted statement is viewed in whole cloth, it can be clearly seen that the Eleventh Circuit continues, as it must, under the prior panel precedent rule,[7] to adhere to the standard of "materiality" established by the former Fifth Circuit's opinions in *Ross* and *Buckley* — a standard that requires more than a mere demonstration of "helpful[ness] to the defense" to establish the "materiality" of pretrial disclosures: *i.e.*,

> An item in the first category [of former Rule 16(a)(1)(C),[8] or, as
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> Upon request of the defendant, the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and *which are material to the preparation of the defendant's defense* or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

See United States v. Jordan, 316 F.3d 1215, 1225 n.12, 1249-50 & n.73 (11th Cir. 2003) (emphasis supplied). The Federal Rules of Criminal Procedure were last amended in 2002, and the foregoing language (with some stylistic revisions) was redesignated Rule 16(a)(1)(E).

[7] The "firmly established" rule of the Eleventh Circuit is that "each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc, or by the Supreme Court." *United States v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993); *see also, e.g., United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (*en banc*) ("Under our prior panel precedent rule, a panel cannot overrule a prior one's holding even though convinced it is wrong."). Cutting this point even finer, it also must be remembered that, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

[8] *See supra* note 6.

> here, reports of examination and tests sought by defendant under the present text of Rule 16(a)(1)(F)(iii)] need not be disclosed unless the defendant demonstrates that it is material to the preparation of his defense. A general description of the item will not suffice; neither will a conclusory argument that the requested item is material to the defense. *See United States v. Carrasquillo-Plaza*, 873 F.2d 10, 12-13 (1st Cir. 1989); *United States v. Cadet*, 727 F.2d 1453, 1466 (9th Cir. 1984). Rather, the defendant must make a specific request for the item together with an explanation of how it will be "helpful to the defense." *See, e.g., United States v. Marshall*, 328 U.S. App. D.C. 8, 132 F.3d 63, 67-68 (D.C. Cir. 1998) ("helpful" means relevant to preparation of the defense and not necessarily exculpatory); *United States v. Olano*, 62 F.3d 1180, 1203 (9th Cir. 1995). As the Fifth Circuit put it in *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir. 1978) (quoting *United States v. Ross*, 511 F.2d 757, 762-63 (5th Cir. 1975)), the defendant must "show" "more than that the [item] bears some abstract logical relationship to the issues in the case. . . . There must be some indication that the pretrial disclosure of the [item] would . . . enable [] the defendant significantly to alter the quantum of proof in his favor."

Jordan, 316 F.3d at 1250-51 (alterations in original).

II.

Defendant next argues that the magistrate judge ignored the substantial showing of materiality made in his discovery request. Defendant points to the fact that the government filed an unsealed indictment charging him with the Atlanta offenses, and then

> engaged in a relentless media campaign to let the world know its view that Mr. Rudolph is guilty of those charges as well as the Birmingham offenses. [T]he Attorney General and other high governmental officials[] have repeatedly expressed the view in press conferences and other . . . public forums that Eric Rudolph is guilty of the Atlanta

offenses.[9]

Defendant contends that these pronouncements have given rise to "a government-created presumption" of his guilt of the Atlanta bombings, which will "cast its dark shadow over his trial for the Birmingham offenses regardless of whether the government now wishes to belatedly banish the word 'Atlanta' from the formal vocabulary of his trial."[10]

As the magistrate judge pointed out in his opinion, however, these are issues that can be addressed during the *voir dire* process.[11] Further, this court can deliver a jury instruction making clear that the only evidence relevant to the determination of the defendant's guilt or innocence of the Birmingham bombing is that which is related to that event, and no other.

III.

The magistrate judge also pointed out that there will be nothing for defendant to refute in either the guilt or penalty phases if the government does not introduce any evidence of the Atlanta offenses. The court agrees with the magistrate judge that any information related to suspected, allegedly faulty, scientific testing in the Atlanta case would not "significantly . . . alter the quantum of proof in [defendant's] favor" with

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[9] Application for Review (doc. no. 331), at 4 (footnote omitted).

[10] *Id.* at 7. As support for this argument, defendant points to the results of a nationwide survey of 900 registered voters conducted during June of 2003. *See id.* at 6-7.

[11] *See* Mag. Order at 5.

respect to the *guilt phase* of the Birmingham case.[12]

IV.

One issue that was not addressed by either the magistrate judge or the government, however, is defendant's argument that he is entitled to prove during the *penalty phase* of trial, "as an independent mitigating factor under 18 U.S.C. § 3592(a)(5)[,] that he does 'not have a significant prior history of other criminal conduct'";[13] and that he is entitled to the Atlanta bombing evidence in order to discharge his burden of proving this mitigating factor. Defendant presented this argument to the magistrate judge in his reply brief,[14] and presents it again in his application for review here.[15]

The magistrate judge addressed defendant's argument regarding the penalty phase of trial in the context of defendant's need to *refute* the government's evidence of future dangerousness[16] by focusing on the government's representation that it will not point to evidence from the Atlanta bombings to prove future dangerousness.[17]

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[12] *Id.* at 6.

[13] Application for Review (doc. no. 331), at 11.

[14] *See* Reply (doc. no. 243), at 6-9.

[15] *See* Application for Review (doc. no. 331), at 11-13.

[16] The government gave notice pursuant to 18 U.S.C. § 3593(a)(2) that, if defendant is convicted, it proposes to prove, among other aggravating factors justifying a sentence of death, that defendant poses a risk of "future dangerousness": *i.e.*, that he "is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others." Notice of Intent to Seek the Death Penalty (doc. no. 79), ¶ C(1), at 3.

[17] *See* Magistrate Order (doc. no. 322), at 6.

According to the government, if it does not introduce Atlanta evidence during the penalty phase, there is nothing for defendant to refute. This argument does not adequately address that aspect of defendant's argument focusing on *his burden* to prove mitigating factors.[18] A review of the capital sentencing scheme under Title 18 is helpful in understanding the nuances of this issue.

Section 3593(e) of Title 18 provides that the jury may recommend a sentence of death, life imprisonment without possibility of release, "or some other lesser sentence." 18 U.S.C. § 3593(e)(3). Section 3591 *requires* the jury to recommend a death sentence if "it is determined that imposition of a sentence of death is justified." 18 U.S.C. § 3591(a).[19] Section 3592 outlines the mitigating and aggravating factors to be considered in determining whether a sentence of death is justified. *See* 18 U.S.C. § 3592.[20] The relative weight of aggravating versus mitigating factors is paramount during the penalty phase under Title 18. Defendant argues in both his reply brief and application for review that the information he seeks from the Atlanta

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[18] *See* 18 U.S.C. § 3593(c): "The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information."

[19] *Compare* 18 U.S.C. § 3591(a) *with* 21 U.S.C. § 848(k) ("The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, *is never required* to impose a death sentence and the jury shall be so instructed.") (emphasis supplied).

[20] One of the statutory mitigating factors a jury may take into account when "determining whether a sentence of death is to be imposed on a defendant" is that he "did not have a significant prior history of other criminal conduct." 18 U.S.C. § 3592(a)(5).

case is "material" to proving a mitigating factor of no "significant *prior history* of other criminal conduct,"[21] regardless of whether the government seeks to introduce evidence of the Atlanta cases during the Birmingham trial. Defendant argues that the government should not be allowed to eliminate an avenue of his proof of a mitigating factor by choosing not to introduce such evidence in proving guilt or an aggravating factor.[22] The defense's argument is underscored by its suspicion that "the scientific evidence tying Mr. Rudolph to the Atlanta offenses is flawed . . . ."[23]

The government does not address this issue. The court requires a response. Accordingly, the government is ordered to respond specifically to this discrete argument. The government is further directed to answer the following questions in its response:

1. Although the government states that it does not intend to introduce evidence regarding the Atlanta bombings in either the guilt or penalty phases of the trial in this District, neither party discusses the issue of rebuttal. If the defendant should point out to the jury that the government has chosen not to introduce any evidence of the Atlanta bombings, and (a) insinuates that the jury could look at that lack of evidence to establish reasonable doubt of the aggravating factor of future dangerousness, or (b) points to the lack of evidence as further proof of the mitigating factor of "no significant prior history of other criminal conduct," will the government maintain its position that it will not attempt to introduce any evidence regarding the Atlanta bombings?

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[21] Of course, the Atlanta bombings occurred in 1996, *prior to* the explosion at the New Woman All Women Health Clinic in Birmingham.

[22] *See* 18 U.S.C. § 3593(c): "The defendant may present any information relevant to a mitigating factor."

[23] Application for Review at 7.

2. How does a capital defendant satisfy his burden of proving he does not have a significant prior history of other criminal conduct if the evidence of such charged (but unproven) conduct is in the exclusive possession of the government?

The government's response is due on or before Friday, October 22, 2004.

DONE this 14th day of October, 2004.

Edward Smith
United States District Judge